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UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

HOOPA VALLEY TRIBE,)	Civ. No. 16-CV-04294-WHO
)	
Plaintiff,)	
)	
v.)	
)	FIRST AMENDED COMPLAINT
U.S. BUREAU OF RECLAMATION)	FOR DECLARATORY AND
)	INJUNCTIVE RELIEF
and)	
)	Endangered Species Act and
NATIONAL MARINE FISHERIES SERVICE,)	Administrative Procedure Act Case
)	
Defendants.)	
)	

INTRODUCTION

1
2 1. In this action for declaratory and injunctive relief, Plaintiff Hoopa Valley Tribe
3 (“Tribe”) challenges the actions of the United States Bureau of Reclamation (“BOR”) and the
4 National Marine Fisheries Service (“NMFS”) for violating the Endangered Species Act (“ESA”),
5 16 U.S.C. §§ 1531 *et seq.*, in operating the Klamath Irrigation Project (“Klamath Project”).
6 Specifically, the Tribe seeks an order declaring that NMFS and BOR have illegally failed to
7 reinstate formal consultation pursuant to Section 7 of the ESA, 16 U.S.C. § 1536, and 50 C.F.R.
8 § 402.16 regarding the effects of Project operations on Southern Oregon/Northern California
9 Coast (“SONCC”) Coho salmon, which are listed as threatened under the ESA, and an order
10 enjoining them to do so. The Tribe further seeks an order declaring that BOR’s continued
11 operation of the Klamath Project has caused excessive take of SONCC Coho salmon and has
12 failed to insure that operation of the Klamath Project is not likely to jeopardize the continued
13 existence of SONCC Coho, resulting in violations of Sections 7 and 9 of the ESA. The Tribe
14 also seeks an order enjoining any prospective operation of the Klamath Project that could further
15 take SONCC Coho salmon pending completion of the re-initiated consultation.

16 2. The Secretary of the Interior, acting through the BOR, manages and operates the
17 Klamath Project, which diverts water from the Klamath River to supply irrigation water to
18 agricultural lands. BOR controls diversion and releases of water from Upper Klamath Lake,
19 which in turn substantially affect flow levels in the Klamath River downstream of Iron Gate dam.
20 BOR identifies timely volumes of water flows at Iron Gate Dam that are available for Chinook,
21 Coho, and other salmon habitat after BOR has estimated the water supply needs throughout the
22 year of the Klamath Project for irrigation purposes.

23 3. BOR’s operation of the Klamath Project is subject to and must comply with the
24 ESA. In addition, BOR owes a fiduciary trust responsibility to the Tribe, which holds federal
25 reserved rights to fish and water in the Klamath River.
26

1 4. On May 31, 2013, NMFS and the United States Fish and Wildlife Service
2 (“USFWS”) issued “Biological Opinions on the Effects of Proposed Klamath Project Operations
3 from May 31, 2013, through March 31, 2023, on Five Federally Listed Threatened and
4 Endangered Species” (the “2013 BiOp”). The 2013 BiOp addresses effects of proposed Klamath
5 Project operations on SONCC Coho salmon. The 2013 BiOp is accompanied by an Incidental
6 Take Statement (“ITS”) that establishes the permissible amount or extent of “take” of SONCC
7 Coho.

8 5. The 2013 BiOp acknowledges that Klamath Project operations exacerbate the
9 impact and severity of a lethal fish disease known as *Ceratomyxa Shasta* (*C.shasta*) on juvenile
10 salmonids due to the reduction of magnitude, frequency, and duration of flows in the mainstem
11 Klamath River.

12 6. A critical assumption, as well as a limit for the annual incidental take of SONCC
13 Coho in the 2013 BiOp and ITS, is that approximately 50% of the total annual Chinook salmon
14 juveniles in the mainstem Klamath River between the Shasta River and the Trinity River will not
15 be infected with *C.shasta* during the months of May to July. 2013 BiOp at 392. Due to the
16 small population size and limited sampling data for SONCC Coho, NMFS used infection rates
17 for Chinook salmon as a surrogate for infection rates and incidental take of SONCC Coho
18 salmon. The 2013 BiOp states that “[i]f the percent of *C. Shasta* infections for Chinook salmon
19 juveniles in the mainstem Klamath River between Shasta River and Trinity River during May to
20 July exceed these levels (i.e., 54 percent infection via histology or 49 percent infection via
21 QPCR), reinitiation of formal consultation will be necessary.” *Id.* at 391. The 2013 BiOp relies
22 on not violating this required limit for incidental take to conclude that continued operations of
23 the Klamath Project will not jeopardize SONCC Coho or adversely modify its critical habitat.

24 7. In 2014, the average juvenile Chinook salmon *C.shasta* infection rate in the
25 Klamath River upstream of the Trinity River confluence from May through July was estimated at
26 81%. In 2015, the average juvenile Chinook salmon *C.shasta* infection rate in the same part of

1 the river was estimated at 91%. These infection rates greatly exceed the permissible rates in the
2 2013 BiOp and ITS. The rates of infection, and subsequent death of salmon, were caused by
3 factors including low stream flows.

4 8. Despite the significant exceedance of *C. Shasta* infection rates and the occurrence
5 of multi-year drought and hydrologic conditions and resulting operational changes that were not
6 anticipated in the 2013 BiOp, BOR and NMFS have failed to reinitiate consultation as required
7 by the 2013 BiOp, by Section 7 of the ESA, and by 50 CFR § 402.16. Without reinitiation of
8 formal consultation, BOR has continued to operate the Project under the terms and conditions of
9 the 2013 BiOp and the ITS in a manner that results in excessive incidental take of SONCC Coho.

10 9. This action seeks to require NMFS and BOR to reinitiate formal consultation
11 pursuant to the ESA and to invalidate the 2013 BiOp and its Incidental Take Statement (“ITS”)
12 for two principal reasons. The ESA and its implementing regulations at 50 CFR § 402.16 require
13 re-initiation of formal consultation: (a) if the amount of taking specified in the ITS is exceeded;
14 or (b) if new information reveals effects of the action to an extent not previously considered.
15 Despite fulfillment of these conditions, and despite the express terms of the BiOp requiring re-
16 initiation of consultation under the present circumstances, NMFS and BOR have failed and
17 refused to reinitiate formal consultation.

18 10. This action seeks a declaration that NMFS and BOR have violated the ESA by
19 failing to reinitiate consultation and unlawfully taking SONCC Coho through Klamath Project
20 operations. The 2013 BiOp and ITS have clearly failed to protect SONCC Coho and its habitat
21 from excessive take and have failed to insure that Project operations are not likely to jeopardize
22 the continued existence of SONCC Coho

23 11. This action also seeks an injunction directing NMFS to withdraw the 2013 BiOp
24 and ITS, complete a new consultation with BOR on a schedule set by the Court, and for BOR to
25 operate the Klamath Project in a manner which preserves and protects SONCC Coho salmon
26 pending completion of consultation in accordance with the best available science. This relief is

1 necessary to preserve the status quo, to correct illegal final agency action, to prevent future
 2 unlawful agency actions that may cause additional irreparable harm to the environment and
 3 species listed for protection under the ESA, and to protect tribal trust resources.

4 12. This action also seeks an injunction preventing BOR from relying on the 2013
 5 BiOp and ITS to satisfy ESA obligations, and an injunction requiring BOR to limit irrigation
 6 water deliveries to the Klamath Project that would cause Klamath River flows below Iron Gate
 7 Dam to fall below the levels necessary for survival and recovery of SONCC Coho as determined
 8 by the best available science or result in excessive incidental take in the period before a new
 9 legally and biologically valid Biological Opinion is issued.

10 13. Finally, this action seeks an order requiring NMFS to complete consultation on
 11 the effects of the Klamath Project on Essential Fish Habitat for Chinook salmon and other
 12 species pursuant to the Magnuson-Stevens Fishery Conservation and Management Act
 13 (“MSFCMA”), 16 U.S.C. § 1855(b)(4)(B).

14 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

15 14. This action is brought pursuant to the ESA, 16 U.S.C. § 1540(g)(1) and the APA,
 16 5 U.S.C. §§ 704, 706. This Court has jurisdiction pursuant to 5 U.S.C. §§ 704, 706, 28 U.S.C.
 17 § 1331, 28 U.S.C. § 1362, 16 U.S.C. § 1540(g)(1), 16 U.S.C. § 1855 and 16 U.S.C. § 1861.

18 15. The Tribe provided NMFS and BOR with notice of intent to sue for violations of
 19 the ESA, pursuant to 16 U.S.C. § 1540(g) on May 17, 2016. NMFS and BOR have failed to
 20 correct or remedy their violations of the ESA.

21 16. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 16 U.S.C.
 22 § 1540(g)(3), as the Tribe resides in this district and many of the events, omissions, and
 23 consequences of Defendants’ violations of the law giving rise to the claims occurred or will
 24 occur in this district.

25 17. Intradistrict Assignment: this case is properly assigned to the San
 26 Francisco/Oakland Division under Civil L.R. 3-2(c) because a substantial part of the events or

omissions which give rise to this action occurred in Humboldt and Del Norte counties, counties through which the lower Klamath River flows, because the Tribe and its Reservation are located in Humboldt County, and because the location of the fish disease is in Humboldt and Del Norte Counties.

PARTIES

18. Plaintiff Hoopa Valley Tribe is a federally-recognized Indian tribe. Since time immemorial, the Tribe and its members have used, and continue to use, the Klamath-Trinity River system and its anadromous fishery resource for subsistence, cultural, ceremonial, religious, and commercial purposes. The lower twelve miles of the Trinity River and a stretch of the Klamath River flows through the Hoopa Valley Reservation. All migrating salmon from the Trinity River must use the mainstem of the Klamath River as their corridor to and from the sea. The Tribe's members' past, present, and future enjoyment of the benefits provided by the Klamath-Trinity River system has been, is being, and will continue to be injured by defendants' on-going disregard of their statutory duties and by the injuries caused by the unlawful operation of the Klamath Project and the resulting impacts to anadromous fish, including SONCC Coho.

19. Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The salmon fishery also holds significant commercial and economic value in the Hoopa culture and economies, and the Tribe holds property rights in the Klamath River Basin fishery. The lower twelve miles of the Trinity River and a stretch of the Klamath River near the confluence with the Trinity River flow through the Hoopa Valley Reservation. *See* Memorandum from John D. Leshy, Solicitor of the Department of the Interior to the Secretary of the Interior 3-4 (Oct. 4, 1993) (hereinafter 1993 Solicitor Opinion).

20. The principal purpose of the Tribe's Reservation was to set aside sufficient resources of these rivers for the Indians to be self-sufficient and achieve a moderate living based on fish. *See* 1993 Solicitor Opinion 3, 15, 18-21, *cited with approval*, *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996). The Tribe's federal reserved fishing right carries with it a corresponding right to Klamath and Trinity River flow levels that are sufficient to support a productive habitat for the Tribe's anadromous fishery, including but not limited to Coho and Chinook salmon.

21. Defendants in this action are:

A. United States Bureau of Reclamation ("BOR"), an agency of the United States Department of the Interior, constructs and operates federal water projects throughout the United States. BOR has primary management authority over the Klamath Project, the operation of which is at the heart of this action, and has a trust responsibility to ensure a continued fishery for the Tribe.

B. National Marine Fisheries Service ("NMFS") is an agency of the United States Department of Commerce responsible for administering the provisions of the Endangered Species Act with regard to threatened and endangered marine species, including the species of threatened Coho salmon that live in the Klamath River basin. Both BOR and NMFS are obligated by federal law to protect the Tribe's fishing rights in the Klamath-Trinity River system and each have a trust responsibility to ensure a continued fishery for the Tribe.

NATURE AND BACKGROUND OF CASE

A. The Klamath River's Imperiled Ecosystem

22. Habitat critical for the survival of the Coho salmon is located in the lower-Klamath River and within the Hoopa Valley Reservation on the Tribe's former ancestral lands in the southern part of the Klamath Basin. For more than 100 years the Hoopa Valley Reservation has encompassed much of the Klamath and Trinity Rivers. In 1988, Congress partitioned the Hoopa Valley Reservation, reserving to the Hoopa Valley Tribe the portion of the reservation

1 extending six miles to either side of the Trinity River and part of the Klamath River, near the
2 confluence with the Trinity River. Several species of anadromous fish inhabit the Klamath-
3 Trinity River system and its tributaries, including Chinook, Coho, steelhead, green sturgeon, and
4 coastal cutthroat trout. Klamath River runs of salmon and steelhead at one time were among the
5 region's mightiest. SONCC Coho salmon, a population that includes Klamath and Trinity River
6 Coho, was estimated in 1940 to range between 150,000 and 400,000 naturally spawning fish
7 annually. *See* Threatened Status for SONCC ESU of Coho Salmon, 62 Fed. Reg. 24588, 24588
8 (May 6, 1997) ("Listing Notice").

9 23. A multitude of factors, including habitat destruction, and hydropower
10 development contributed to drastic declines of all stocks of salmonids in recent decades. In
11 1997, NMFS concluded that "Coho populations in this ESU are very depressed, currently
12 numbering approximately 10,000 naturally produced adults." *Id.*

13 The perilous situation of the SONCC Coho salmon prompted
14 NMFS in 1997 to list the fish under the ESA as threatened. In
15 listing the Coho, NMFS noted that "water diversions" and "water
16 withdrawals" for irrigation were "major activities responsible for
17 the decline of Coho salmon in Oregon and California." *Id.* at
18 24,592. NMFS further concluded that depletion and storage of
19 natural flows have drastically altered natural hydrological cycles,
20 especially in California and southern Oregon rivers and streams.
21 Alteration of streamflows has increased juvenile salmonid
22 mortality for a variety of reasons: Migration delay resulting from
23 insufficient flows or habitat blockages; loss of usable habitat due to
24 dewatering and blockage; stranding of fish resulting from rapid
25 flow fluctuations; entrainment of juveniles into unscreened or
26 poorly screened diversions; and increased juvenile mortality
resulting from increased water temperatures. In addition, reduced
flows degrade or diminish fish habitats via increased deposition of
fine sediments in spawning gravels, decreased recruitment of new
spawning gravels, and encroachment of riparian and non-endemic
vegetations into spawning and rearing areas.

25 *Id.* at 24,593. Klamath River basin steelhead, part of the Klamath Mountains Province steelhead
26 ESU, remain a candidate species for listing under the ESA due to high risk factors. 63 Fed. Reg.

1 13347 (Mar. 19, 1998). Klamath River basin Chinook suffer the same ill effects from Klamath
2 Project water withdrawals.

3 24. In originally designating critical habitat for the SONCC Coho salmon, NMFS
4 noted that “essential features” of Coho habitat include water quantity, water velocity, and water
5 temperature. *See* Designated Critical Habitat: Central California Coast and Southern
6 Oregon/Northern California Coast Coho Salmon, 64 Fed. Reg. 24,049, 25,059 (May 5, 1999).
7 NMFS further concluded that irrigation water withdrawals and dam operations were “activities
8 that may require special management considerations” for juvenile Coho salmon. *Id.* at 24,059.
9 Chinook salmon require the same habitat characteristics, and water withdrawals and dam
10 operations also affect Chinook salmon habitat and populations.

11 25. Concerned with continued drastic drops in salmon populations in the Klamath and
12 Trinity Rivers, Congress in 1984 enacted the Trinity River Basin Fish and Wildlife Management
13 Act of 1984, Pub. L. 98-541, noting the decreased flows in the Trinity River caused by BOR’s
14 operations and directing the Secretary of the Interior to develop a management program for the
15 river to restore fish levels. Subsequently in 1986, Congress enacted the Klamath Basin Fishery
16 Resources Restoration Act (“Klamath Restoration Act”), 16 U.S.C. § 460ss. Among various
17 causes of the declines in salmon, Congress cited “the construction and operations of dams,
18 diversions, and hydroelectric projects” which have contributed to, among other things, “reduced
19 flows . . . which ha[ve] significantly reduced the anadromous fish habitat in the Klamath-Trinity
20 River system.” 16 U.S.C. § 460ss(3).

21 B. BOR’s Management of Water in the Klamath Basin

22 26. Congress authorized construction and development of the Klamath Project in
23 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which is part of the
24 Reclamation Act of 1902, 43 U.S.C. § 372 *et seq.* Various project facilities were built between
25 1906 and 1966. The Klamath Project consists of several major dams, including Link River Dam,
26 Clear Lake Dam, and Gerber Dam, as well as various canals and pumping stations. BOR’s

1 project operations determine the level, timing, and rate of water flow in the Klamath River below
2 Iron Gate Dam.

3 27. The Klamath Project provides irrigation water to approximately 200,000 acres of
4 agricultural land each year. The Klamath Project also supplies water for a system of wildlife
5 refuges operated by the U.S. Fish and Wildlife Service (“FWS”). Four national wildlife refuges
6 – Lower Klamath, Tule Lake, Clear Lake, and Upper Klamath – lie within the boundaries of the
7 project.

8 28. Pursuant to a 1956 contract with BOR, PacifiCorp, a private corporation, operates
9 the Klamath Project’s Link River Dam. PacifiCorp also owns and operates several downstream
10 dams on the Klamath River for hydroelectric power generation, including the Iron Gate Dam in
11 Northern California. These projects are operated pursuant to a Federal Energy Regulatory
12 Commission (“FERC”) license that sets certain minimum instream flows at Iron Gate Dam.

13 29. Operation of the Klamath Project has a major impact on flows in the Klamath
14 River downstream of Iron Gate Dam and on anadromous fish habitat in both the Klamath and
15 Trinity Rivers.

16 30. BOR maintains ongoing discretionary management authority and control over the
17 Klamath Project. Since 1996, BOR has operated the Klamath Project with annual operating
18 plans that designate or identify minimum flow levels in the Klamath River downstream of Iron
19 Gate Dam. These plans identify flows that are likely to be met – after agricultural diversions are
20 satisfied – during particular times of the year in terms of the cubic feet per second (“cfs”) of
21 water as measured flowing past Iron Gate Dam. BOR’s 2016 Annual Operations Plan calculates
22 that 388,680 acre-feet of water will be supplied to the Klamath Project, water that would
23 otherwise flow down the Klamath River.

24 31. BOR’s diversions of water occur upstream of the portion of the Klamath River in
25 which fish disease is most prevalent. BOR’s actions result in hydrologic concentrations of
26

1 *C.shasta* actinospore that increase the percentage of disease-related mortality to Coho salmon in
 2 the mainstem Klamath River in May to mid-June.

3 C. Endangered Species Act Consultation

4 32. The ESA grants the right to any person to bring suit “to enjoin any person,
 5 including the United States and any other governmental instrumentality or agency . . . who is
 6 alleged to be in violation of any provision of [the ESA] or regulation issued under the authority
 7 thereof.” 16 U.S.C. § 1540(g)(1)(A). The District Courts have jurisdiction “to enforce any such
 8 provision or regulation, or to order the Secretary to perform such act or duty, as the case may
 9 be.” 16 U.S.C. § 1540(g).

10 33. The Administrative Procedure Act (“APA”) authorizes courts reviewing agency
 11 action to hold unlawful and set aside final agency action, findings, and conclusions that are
 12 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.
 13 5 U.S.C. § 706(2)(A).

14 34. Section 7 of the ESA prohibits agency actions that may jeopardize the survival
 15 and recovery of a listed species or adversely modify its critical habitat:

16 [e]ach federal agency shall, in consultation with and with the
 17 assistance of the Secretary, insure that any action authorized,
 18 funded, or carried out by such agency (hereinafter in this section
 19 referred to as an “agency action”) is not likely to jeopardize the
 20 continued existence of any endangered species or threatened
 species or result in the destruction or adverse modification of
 habitat of such species which is determined by the Secretary . . .
 to be critical. . . .

21 16 U.S.C. § 1536(a)(2).

22 35. Section 9 of the ESA prohibits “take” of listed species by anyone, including
 23 federal agencies. 16 U.S.C. § 1538. “Take” means to “harass, harm, pursue, hunt, shoot, wound,
 24 kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). NMFS has defined “harm” to include
 25 “significant habitat modification or degradation which actually kills or injures fish or wildlife by
 26 significantly impairing essential behavioral patterns, including breeding, spawning, rearing,

1 migrating, feeding or sheltering.” 50 C.F.R. § 222.102. “Take” by federal agencies is permitted
2 only if the agency receives an Incidental Take Statement (“ITS”) pursuant to Section 7(b)(4),
3 upon completion of formal consultation. 16 U.S.C. § 1536(b)(4). If an ITS is issued, any take
4 that occurs must be within the limits set in the ITS.

5 36. As part of any ITS, NMFS must specify “the impact of such incidental taking
6 on the species” - quantifying by amount or extent the allowed incidental take. 16 U.S.C.
7 § 1536(b)(4)(C)(i). Such a statement of impact makes explicit the basis for NMFS’ required
8 finding that an incidental take will not jeopardize the species, 16 U.S.C. § 1536(b)(4), and it
9 provides a check on the adequacy of NMFS’ “reasonable and prudent measures . . . necessary or
10 appropriate to minimize such impact.” 16 U.S.C. § 1536(b)(4)(C)(ii).

11 37. Section 7 of the Act also establishes an interagency consultation process to assist
12 federal agencies in complying with their duty to avoid jeopardy to listed species, or destruction
13 or adverse modification of critical habitat. Under this process, a federal agency proposing an
14 action that “may affect” a listed species, including salmon and steelhead, must prepare and
15 provide to the appropriate expert agency, here NMFS, a “biological assessment” of the effects of
16 the proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

17 38. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency
18 initiates consultation on an action under ESA § 7(a)(2), it “shall not make any irreversible or
19 irretrievable commitment of resources with respect to the agency action which has the effect of
20 foreclosing the formulation or implementation of any reasonable and prudent alternative
21 measures which would not violate subsection (a)(2) of this section.” The purpose of ESA § 7(d)
22 is to maintain the status quo pending the completion of interagency consultation.

23 39. For those actions that may adversely affect a species, NMFS must review all
24 information provided by the action agency in the biological assessment, as well as any other
25 relevant information, to determine whether the proposed action is likely to jeopardize a listed
26 species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3).

1 This determination is set forth in a biological opinion from NMFS. *Id.*; 16 U.S.C.
2 § 1536(b)(3)(A).

3 40. In formulating its biological opinion, NMFS must evaluate the “effects of the
4 action” together with “cumulative effects” on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4).
5 This multi-step analysis requires NMFS to consider:

6 a. the direct, indirect, interrelated, and interdependent effects of the proposed
7 action, 50 C.F.R. § 402.02;

8 b. the “environmental baseline” to which the proposed action will be added.
9 This baseline includes “all past and present impacts of all Federal, State, or private actions and
10 other human activities in the action area; the anticipated impacts of all proposed Federal projects
11 in the action area that have already undergone formal or early section 7 consultation; and the
12 impact of State or private actions which are contemporaneous with the consultation in progress,”
13 50 C.F.R. § 402.02; and,

14 c. any “future State or private activities, not involving Federal activities, that
15 are reasonably certain to occur within the action area of the Federal action subject to
16 consultation,” 50 C.F.R. § 402.02.

17 41. The regulations do not, however, permit NMFS to consider the effects of future
18 federal actions when determining whether a proposed federal action will jeopardize a listed
19 species. *Id.*; *see also* 51 Fed. Reg. 19933 (June 3, 1986) (Interagency Cooperation – Endangered
20 Species Act of 1973, as Amended; Final Rule) (“Since all future Federal actions will at some
21 point be subject to the section 7 consultation process pursuant to these regulations, their effects
22 on a particular species will be considered at that time and will not be included in the cumulative
23 effects analysis.”). Such future federal actions also are not properly a part of the environmental
24 baseline, given that they have not yet occurred.

25 42. After issuance of a Biological Opinion, NMFS and the agency with discretionary
26 federal involvement or control over the action must reinitiate formal consultation in certain

1 circumstances. 50 CFR § 402.16. For example, reinitiation must be requested if (a) the amount
2 or extent of taking specified in the ITS is exceeded; or (b) new information reveals effects of the
3 action that may affect listed species or critical habitat in a manner or to an extent not previously
4 considered.

5 D. MSFCMA Consultation

6 43. The MSFCMA requires a three-step consultation process between the acting
7 agency, the BOR, and NMFS regarding effects on Essential Fish Habitat. First, the acting
8 agency “shall consult with the Secretary [NMFS] with respect to any action authorized, funded
9 or undertaken or proposed . . . that may adversely affect any essential fish habitat.” Then, the
10 Secretary shall “recommend to such agency measures that can be taken by such agency to
11 conserve such habitat.” Finally, the action agency “shall provide a detailed response in writing .
12 . . [which] include[s] a description of measures proposed by the agency for avoiding, mitigating,
13 or offsetting the impact of the activity on such habitat.”

14 44. Essential Fish Habitat has been designated. 79 Fed. Reg. 75449 (Dec. 18, 2014).
15 The Klamath River is included in the Essential Fish Habitat of salmon.

16 E. BOR’s Past Consultation Efforts

17 45. In 1999, BOR consulted with NMFS regarding the impacts of the 1999 Klamath
18 Operations Plan on listed Coho salmon under Section 7(a)(2) of the ESA. In 1999, NMFS issued
19 a Biological Opinion (“1999 BiOp”) that found that operation of the Klamath Project, and its
20 associated water diversions, withdrawals, temperature impacts, and pollutant loadings would
21 adversely affect listed Coho salmon. The 1999 BiOp describes how inadequate flows and
22 sudden changes in flow level result in stranding of anadromous fish and the destruction of usable
23 habitat. The 1999 BiOp concludes that higher flows in the Klamath River are associated with
24 increased juvenile salmon survival. Nevertheless, in the 1999 BiOp, NMFS found that the
25 Klamath Project was not likely to jeopardize SONCC Coho.
26

1 46. In 2000, BOR's Klamath Operation Plan again specified minimum flow levels
2 that varied on a monthly or bi-weekly basis, but BOR never completed the requisite ESA
3 consultation. BOR's failure to follow the law led this Court to rule that "[d]espite the weight
4 which the Ninth Circuit repeatedly has placed upon the procedural requirements of the ESA, it is
5 clear that the Bureau of Reclamation failed to comply with these requirements before
6 implementing its 2000 Operations Plan for the Klamath Project." *Pacific Coast Fed'n of*
7 *Fishermen's Ass'ns v. United States Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1242-43
8 (N.D. Cal. 2001).

9 47. On May 31, 2002, NMFS issued its Biological Opinion: Klamath Project
10 Operations, June 1, 2002 - March 31, 2012 ("2002 BiOp"). NMFS found the proposed operation
11 of the Klamath Project is likely to jeopardize the continued existence of SONCC Coho and
12 adversely modify its designated critical habitat.

13 48. After finding jeopardy, NMFS identified and described the RPA to the proposed
14 action that it believed would avoid jeopardy and adverse modification. 16 U.S.C.
15 § 1536(b)(3)(B).

16 49. The 2002 BiOp and RPA have five major components, including: specific water
17 management measures over the ten-year period; a water bank and water supply enhancement
18 program for flows in the Klamath River below Iron Gate dam; a long-term flow target; an inter-
19 governmental task force; and an inter-governmental research science panel.

20 50. In its ITS for the 2002 BiOp and RPA, NMFS found that "some level of
21 incidental take [is] to occur due to implementation of some of the actions outlined in the
22 reasonable and prudent alternative." 2002 BiOp at 71. However, NMFS failed to quantify,
23 either numerically or by extent, the incidental take permitted under the 2002 BiOp. Moreover,
24 NMFS failed to evaluate whether this unspecified level of take, combined with already-permitted
25 levels of take for SONCC Coho, would jeopardize the continued existence of the species.
26

1 51. Plaintiff Hoopa Valley Tribe, the Pacific Coast Federation of Fishermen's
2 Associations and others filed suit challenging the 2002 BiOp in related case *PCFFA, et al v.*
3 *U.S. Bureau of Reclamation*, No. C 02-2006 (N.D. Cal.). On July 15, 2003, this Court granted
4 Plaintiffs' Motion for Summary Judgment, in part, concluding that the RPA and ITS in NMFS'
5 2002 BiOp were arbitrary and capricious.

6 52. The United States Court of Appeals for the Ninth Circuit agreed that the short-
7 term measures in the 2002 BiOp were arbitrary and capricious. *PCFFA v. U.S. Bureau of*
8 *Reclamation*, 426 F.3d 1082 (9th Cir. 2005). The Ninth Circuit also ruled that the 2002 BiOp's
9 phased increases in water flows meant that five full generations of SONCC Coho would
10 complete their three-year life cycles during years of insufficient water. The Court stated: "If
11 that happens, all the water in the world in 2010 and 2011 will not protect the Coho, for there will
12 be none to protect." *Id.* at 1094.

13 53. On remand, the District Court directed NMFS and BOR to reinitiate consultation;
14 NMFS to issue a new Biological Opinion; and BOR to limit project irrigation deliveries if they
15 would cause flows in the Klamath River to fall below 100% of the Phase III flow levels
16 identified by NMFS in its 2002 BiOp.

17 54. In 2007, BOR reinitiated consultation but, after NMFS issued a draft jeopardy
18 BiOp, BOR requested that NMFS suspend the completion of the consultation. On March 18,
19 2010, NMFS issued its BiOp for the period 2010 – 2018 concluding that Reclamation's proposed
20 operations would likely jeopardize the continued existence of SONCC Coho salmon.

21 55. The 2010 BiOp caused BOR to again reinitiate consultation. In 2013, NMFS
22 revised its proposed action to increase the minimum daily flow targets for April, May and June,
23 as well as other changes.

24 56. On May 31, 2013, NMFS (together with FWS) issued the 2013 BiOp. NMFS
25 concluded that the action, as proposed, is not likely to jeopardize the continued existence of the
26

1 SONCC Coho. However, NMFS stated that it expected incidental take of SONCC Coho and
2 other species.

3 57. Among the anticipated forms of incidental take is BOR's creation of conditions
4 promoting the spread of fish diseases such as *C.shasta*. The 2013 BiOp states: "If the percent of
5 *C.shasta* infections for Chinook salmon juveniles in the mainstem Klamath River between
6 Shasta River and Trinity River during May to July exceed these levels (i.e., 54% infection via
7 histology or 49% infection via QPCR), re-initiation of formal consultation will be necessary."
8 2013 BiOp at 391.

9 58. BOR maintains continuing discretionary authority and control of the Klamath
10 Project subject to federal laws including the ESA.

11 59. On July 17, 2015, BOR contacted NMFS concerning the previous two years of
12 implementing the proposed action under the 2013 BiOp. The subject line of the July 17, 2015
13 letter read "Notification of Modification, Amendment, Clarification and/or Reinitiation of
14 Formal Consultation on Klamath Project Operations." BOR did not request or commence
15 reinitiation of formal consultation with NMFS regarding SONCC Coho in the July 17, 2015
16 letter or in any other communication. BOR did note in the letter that "one of [the] outstanding
17 issues is completion of the Essential Fish Habitat and Orca consultation." See Exhibit 1.

18 60. On March 29, 2016, NMFS responded to BOR and announced a determination
19 that the Chinook salmon infection rates used in the ITS were exceeded in 2014 and 2015. NMFS
20 stated: "We conclude that the effects analysis and conclusions in the 2013 BiOp remain valid.
21 However, based on new information described below, we intend to revise the ITS prior to the
22 2017 operational water year, commencing April 1, 2017." See Exhibit 2. NMFS did not request
23 or commence reinitiation of formal consultation with BOR regarding SONCC Coho at any time
24 following the exceedances in 2014 and 2015 of the taking specified in the ITS.

25 61. NMFS and BOR have each failed to reinitiate or commence formal consultation
26 despite the occurrence of conditions that require such reinitiation of formal consultation.

62. On May 17, 2016, counsel for the Hoopa Valley Tribe notified the Secretary of the Interior, the Secretary of Commerce, and officials of the BOR and NMFS of the agencies' violations of the ESA through their failure to reinitiate consultation. *See* Exhibit 3.

63. The Hoopa Valley Tribe's May 17, 2016 letter also noted that the 2014 pre-spawn mortality of adult Coho salmon returning to the Trinity River approached 50%, which is the highest ever observed and approximately four times the average pre-spawn mortality recorded in 1997 – 2013. Such unprecedented mortality was not anticipated or analyzed in the 2013 BiOp, and such new information should have required re-initiation of formal consultation.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Failure to Re-Initiate Formal Consultation Under Section 7 of the ESA, 50 CFR § 402.14(i)(4), 50 CFR § 402.16, and the APA.

64. Plaintiff re-alleges, as if fully set forth herein, each and every allegation set forth in this Complaint.

65. NMFS violated § 7 of the ESA, 16 U.S.C. § 1536, 50 C.F.R. § 402.16, and the APA, 5 U.S.C. § 706 by issuing an incidental take statement but failing to reinitiate formal consultation when the take permitted by the ITS was greatly exceeded in 2014 and 2015.

66. BOR violated § 7 of the ESA, 16 U.S.C. § 1536, 50 C.F.R. § 402.14(i)(4) and 50 C.F.R. § 402.16 by failing to reinitiate formal consultation when the take permitted by the ITS was greatly exceeded in 2014 and 2015.

67. Both NMFS and BOR also had a duty to re-initiate formal consultation due to the occurrence of unanticipated pre-spawn mortality conditions that were not considered in the 2013 BiOp and which constitute new information pursuant to 50 CFR § 402.16.

68. BOR and NMFS' failure to re-initiate formal consultation failed to comply with the express terms of the 2013 BiOp and ITS.

69. BOR and NMFS' failure to re-initiate formal consultation failed to comply with regulations regarding re-initiation of consultation. 50 CFR §§ 402.14(i)(4); 50 CFR 402.16.

70. BOR and NMFS' failure to comply with the ESA and its implementing regulations is directly reviewable in this Court pursuant to 16 U.S.C. § 1540(g).

71. BOR and NMFS' actions and omissions, specifically including their failure to reinitiate formal consultation described herein, are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable in this Court under the APA, 5 U.S.C. §§ 704, 706.

72. Failure to re-initiate consultation and BOR's continued operation of the Klamath Project under the 2013 BiOp and ITS has harmed and is irreparably harming Plaintiff and Plaintiff has no adequate remedy at law.

SECOND CLAIM FOR RELIEF

Violation of Duties to Insure Against Jeopardy Under Section 7 of the ESA by BOR

73. Plaintiff re-alleges, as if fully set forth herein, each and every allegation set forth in this Complaint.

74. By continuing to operate the Klamath Project pursuant to the 2013 BiOp and ITS and without reinitiation of formal consultation under the ESA, BOR is violating its affirmative duty to insure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species," here, SONCC Coho. 16 U.S.C. § 1536(a)(2).

75. By continuing to operate the Klamath Project pursuant to the 2013 BiOp and ITS and without reinitiation of formal consultation under the ESA, BOR is violating its affirmative duty to insure that "any action authorized, funded, or carried out by such agency . . . is not likely to . . . result in the destruction or adverse modification of habitat of [SONCC Coho] which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2).

1 76. By continuing to operate the Klamath Project pursuant to the 2013 BiOp and ITS
 2 and without reinitiation of formal consultation under the ESA, BOR is violating its affirmative
 3 duty to “not make any irreversible or irretrievable commitment of resources with respect to the
 4 agency action which has the effect of foreclosing the formulation or implementation of any
 5 reasonable and prudent alternative measures which would not violate [ESA Section 7(a)(2)].” 16
 6 U.S.C. § 1536(d).

7 77. BOR’s failures to comply with the ESA and its implementing regulations are
 8 directly reviewable in this Court pursuant to 16 U.S.C. § 1540(g).

9 78. BOR’s actions and omissions are arbitrary, capricious, an abuse of discretion, and
 10 otherwise not in accordance with the law and are reviewable in this Court under the APA, 5
 11 U.S.C. §§ 704, 706.

12 79. BOR’s continued operation of the Klamath Project in a manner that fails to insure
 13 against jeopardy of the SONCC Coho or unlawful habitat modification has harmed and is
 14 irreparably harming Plaintiff and Plaintiff has no adequate remedy at law.

15 **THIRD CLAIM FOR RELIEF**

16 **Violation of Take Prohibitions in Section 9 of the ESA By BOR and NMFS.**

17 80. Plaintiff re-alleges, as if fully set forth herein, each and every allegation set forth
 18 in this Complaint.

19 81. Section 9 of the ESA prohibits federal agencies from unauthorized take of
 20 threatened and endangered species and prohibits NMFS from authorizing activities that cause the
 21 unauthorized take of threatened and endangered species.

22 82. The terms and conditions of the ITS regarding incidence of disease were exceeded
 23 in 2014 and 2015, rendering the 2013 BiOp and ITS invalid.

24 83. NMFS is violating the ESA by continuing to allow Klamath Project operations
 25 that result in excessive take of SONCC Coho pursuant to the terms of the fundamentally flawed
 26 assumptions in the 2013 BiOp and ITS.

84. BOR's operations of the Klamath Project have exceeded take authorizations in the ITS, and will continue to exceed take authorizations in the ITS, in violation of the ESA.

85. The continued take of juvenile SONCC Coho is likely to occur, particularly in low flow years.

86. NMFS' and BOR's failures to comply with the ESA and its implementing regulations are directly reviewable in this Court pursuant to 16 U.S.C. § 1540(g).

87. NMFS' and BOR's actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable in this Court under the APA, 5 U.S.C. §§ 704, 706.

88. Continuing unauthorized and unlawful take of SONCC Coho causes irreparable harm to Plaintiff and Plaintiff has no adequate remedy at law.

FOURTH CLAIM FOR RELIEF

Violation of MSFCMA and APA by NMFS for Failure to Consult on Essential Fish Habitat

89. Plaintiff re-alleges, as if fully set forth herein, each and every allegation set forth in this Complaint.

90. NMFS has violated the MSFCMA, 16 U.S.C. § 1855(b)(4)(B) by failing to consult on effects of the Klamath Project on Essential Fish Habitat.

91. NMFS' actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable in this Court under the APA, 5 U.S.C. §§ 704, 706.

92. NMFS' failure to consult has harmed and is irreparably harming Plaintiff due to continuing impacts to Essential Fish Habitat caused by the Klamath Project and Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Tribe respectfully requests that this Court:

- A. Determine and declare that NMFS and BOR have violated ESA section 7 and its implementing regulations by failing and deciding not to re-initiate consultation on the Klamath Project's impacts on SONCC Coho;
- B. Determine and declare that BOR's operation of the Klamath Project has violated and will continue to violate ESA section 7 due to BOR's failure to insure that such operations are not likely to jeopardize the continued existence of SONCC Coho or result in destruction or adverse modification of critical habitat;
- C. Determine and declare that BOR's operation of the Klamath Project has violated and will continue to violate ESA section 9 due to unlawful and excessive taking of SONCC Coho;
- D. Determine and declare that NMFS and BOR have acted in a manner that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 704, 706;
- E. Declare that the analysis of the BiOp and the accompanying ITS are legally invalid and order Defendants to reinitiate consultation and prepare a legally adequate BiOp for Klamath Project operations and any related actions that complies with the requirements of the ESA, on a schedule to be set by the Court;
- F. Order BOR to limit irrigation water deliveries from the Klamath Project in order to implement an interim flow regime in the Klamath River below Iron Gate Dam that will protect anadromous fish in accordance with the best available science and ESA requirements pending Defendants' full compliance with their obligations under the ESA and with their trust obligation to protect the Tribe's fishing rights;
- G. Grant such restraining orders and/or preliminary and permanent injunctive relief as the Tribe may from time to time request to ensure that the Klamath River

H. Determine and declare that NMFS has violated the MSFCMA, 16 U.S.C. § 1855(b)(4)(B), by failing to consult regarding the effects of the Klamath Project on Essential Fish Habitat and ordering NMFS to complete such consultation;

I. Award the Tribe its reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C. § 2412; and

J. Grant the Tribe such further and additional relief as the Court may deem just and proper.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

FIRST AMENDED COMPLAINT - 23

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document, Hoopa Valley Tribe's First Amended Complaint for Declaratory and Injunctive Relief, with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on September 21, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on September 21, 2016.

Executed this 21st day of September, 2016, at Seattle, Washington.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

s/Thomas P. Schlosser

Thomas P. Schlosser

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kfn:9/21/16